

The Honorable Thomas S. Zilly

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTTSDALE INSURANCE COMPANY,

Case No. C15-cv-01000

Plaintiff,

V.

AMERICAN MANAGEMENT SERVICES
EAST, LLC, AMERICAN MANAGEMENT
SERVICES, CALIFORNIA, LLC,
AMERICAN MANAGEMENT SERVICES
LLC, DBA PINNACLE, PINNACLE
BENNING LLC, PINNACLE BELVOIR LLC,
PINNACLE MONTEREY, LLC, PINNACLE
IRWIN LLC, GFS RISK, LLC, GOODMAN
REAL ESTATE, INC., GOODMAN
FINANCIAL SERVICES, INC., JOHN
GOODMAN, AND STANLEY
HARRELSON..

SCOTTSDALE INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT
RE: THE DUTY TO DEFEND

**NOTE ON MOTION CALENDAR:
DECEMBER 18, 2015**

ORAL ARGUMENT REQUESTED

Defendants.

I. INTRODUCTION

Scottsdale Insurance Company (“Scottsdale”) seeks a ruling in two parallel actions, 2:15-cv-01000-TSZ and 2:15-cv-01004-TSZ, that it had no duty to defend its insureds against claims of fraud and intentional misconduct. The insureds—American Management Services, East,

SCOTTSDALE INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT RE: THE DUTY TO
DEFEND - 1
Case No.: C15-cv-01000

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1 LLC, (“AMSE”) American Management Services, California, LLC, (“AMSC”), American
 2 Management Services LLC, dba Pinnacle, (“AMS”) Pinnacle Monterey, LLC , Pinnacle Irwin,
 3 LLC, Goodman Real Estate, Inc., formerly dba Goodman Financial Services, Inc., (“GRE”) John
 4 Goodman (“Goodman”) and Stanley Harrelson (“Harrelson”)—are referred to herein collectively
 5 as “AMS.”¹ They sought defense and indemnity in two actions: *Fort Benning Family*
 6 *Communities, LLC v. American Management Systems East*, Superior Court for the County of
 7 Muscogee, State of Georgia, (the “Fort Benning action”) and *Monterey Bay Military Housing*
 8 *LLC v. Pinnacle Monterey LLC*, U.S. District Court for the Northern District of California (the
 9 “MBMH action”). The Fort Benning and MBMH actions are referred to collectively as the
 10 “underlying actions.”²

11 The underlying actions alleged that AMS engaged in systematic and pervasive fraud and
 12 intentional misconduct in the management of military family housing projects for the U.S. Army
 13 located in Georgia, Virginia and California. (Ex. 16, p. 3; Ex. 21, p. 2.)³ They began as disputes
 14 over whether the property management agreements (“PMAs”), under which AMS entities AMSE
 15 and AMSC served as property managers, had been terminated due to revelations of bribery,
 16 kickbacks and theft in the management of a project in Fort Benning, Georgia. (Ex. 12, pp. 2–3;
 17 Ex. 17, p. 2.) The complaints were later amended to allege widespread fraud, intentional
 18 misconduct, and racketeering by AMS. (Ex. 16, p. 3; Ex. 21, p. 2.) The plaintiffs sought
 19 declaratory judgments terminating the PMAs and alleged breach of fiduciary duty, fraud and
 20 conspiracy, state and federal Civil RICO violations, unjust enrichment and disgorgement,
 21

22 ¹ AMS is referred to in the underlying complaints interchangeably as both “AMS” and “Pinnacle.”

23 ² Pinnacle Monterey and Pinnacle Irwin were only sued in the MBMH Action. Pinnacle Belvoir LLC
 24 and Pinnacle Benning LLC were named as defendants in Case No. 2:15-cv-01000-TSZ, but were not sued
 25 in the underlying actions and, according to AMS’s answer to Scottsdale’s complaint, there is no dispute
 concerning these entities. See Case No. 2:15-cv-01000-TSZ, Dkt. No. 10, p. 2.

26 ³ All Exhibits cited herein are attached to the Stipulated Exhibit List, filed in Case No. C15-cv-01004 as
 Dkt. Nos. 50–52, unless specifically stated otherwise. See also, Dkt. No 30 in Cause No. C15-cv-01000.

1 accounting, attorneys' fees, and punitive damages. (Ex. 16, pp.86–87; Ex. 21, pp. 56–57.) The
 2 Court in the Fort Benning action found that AMS had committed intentional misconduct as a
 3 matter of law. *See American Management Services East, LLC v. Fort Benning Family*
 4 *Communities, LLC*, 333 Ga. App. 664, 774 S.E. 2d 233 (2015). When AMS settled the
 5 underlying actions, it acknowledged that the underlying plaintiffs brought their claims in good
 6 faith and with sufficient evidence to prevail. (G. Bridgman decl., Ex. 1.)

7 Scottsdale insured AMS under four commercial general liability policies in effect from
 8 April 2008 to April 2012. (Exs. 6, 8-10.) Scottsdale denied coverage because the complaints did
 9 not seek covered damages. (Ex. 29.) AMS challenges Scottsdale's declination of coverage and
 10 claims it is entitled to recover "over \$50.0 million" from Scottsdale and its other insurer,
 11 Lexington Insurance Company, for fees and costs allegedly incurred in the underlying actions,
 12 along with \$84 million it agreed to pay in settlement of the underlying actions, plus punitive
 13 damages. (*See Joint Status Report.*) In essence, AMS seeks to be fully immunized by its
 14 insurers from any liability for fraud and intentional wrongdoing. Such immunity would violate
 15 the public policy of the State of Washington. *Am. Home Assur. Co. v. Cohen*, 124 Wn.2d 865,
 16 871, 881 P.2d 1001, 1005 (1994) (it is against public policy to insure against intentional
 17 infliction of harm). Scottsdale seeks a determination that it did not have a duty to defend AMS
 18 for this misconduct, under policies that insured only against accidental property damage or
 19 bodily injury.

20 II. STATEMENT OF FACTS

21 A. The Clark/AMS Joint Venture

22 According to the Fort Benning and MBMH complaints, the underlying actions devolved
 23 from a business venture between AMS, a national property management company, and Clark
 24 Realty Capital ("Clark"), a nationwide real estate developer. Clark and AMS formed a joint
 25 venture in 2001 to pursue contracts to develop and manage privatized housing projects for the
 26

1 United States Armed Services. (Ex. 16, pp. 14–16; Ex. 21, pp. 7–9.) The contracts at issue
 2 related primarily to projects in Monterey Bay, California and Fort Benning, Georgia.

3 **1. Fort Benning**

4 The Fort Benning complaint alleged that in 2003, Clark and AMS created a limited
 5 liability company, Fort Belvoir Residential Communities, LLC (“FBRC”) to act as the owner of
 6 a military housing project at Fort Belvoir, Virginia. (Ex. 16, p. 15.) The members of FBRC
 7 were the U.S. Army and Clark Pinnacle Belvoir, LLC, whose members were a Clark entity,
 8 Clark Belvoir, LLC, and an AMS entity, Pinnacle Belvoir, LLC. Pinnacle Belvoir, LLC was the
 9 managing member. (*Id.*)

10 Later, in 2006, Clark and AMS formed Fort Benning Family Communities, LLC
 11 (“FBFC”) to act as the owner of a military housing project at Fort Benning, Georgia. The
 12 members of FBFC were the United States Army and Clark Pinnacle Benning LLC. Clark
 13 Pinnacle Benning LLC, the managing member, was comprised of a Clark entity, Clark Benning
 14 LLC, and an AMS entity, Pinnacle Benning LLC. (*Id.*)

15 FBRC and FBFC contracted with AMS subsidiary AMS East (“AMSE”) for property
 16 management. The PMAs provided that AMSE would serve as property manager and would
 17 provide insurance for the Fort Benning and Fort Belvoir projects. (*Id.*)

18 **2. Monterey Bay**

19 The Fifth Amended Complaint in the MBMH action alleged that, in 2003, Clark and
 20 AMS created Monterey Bay Military Housing LLC (“MBMH”) and California Military
 21 Communities, LLC, (“CMC”) to act as the owners of military housing projects at the Presidio of
 22 Monterey, Fort Irwin, Moffett Community Housing Area, and other military bases in California.
 23 (Ex. 21, pp. 9–10.) The managing member of MBMH, Clark Pinnacle Monterey Bay LLC, was
 24 a venture involving a Clark entity, Clark Monterey Presidio LLC, and an AMS/Pinnacle entity,
 25 Pinnacle Monterey, LLC. (*Id.*, p. 9.) The complaint alleged that CMC was similarly structured,

1 with the managing member being Clark Pinnacle California Military Communities, LLC
 2 (“CPCMC”), which partnered a Clark entity, Clark Monterey Irwin, LLC, with an AMS entity,
 3 Pinnacle Irwin, LLC. (*Id.*, p.10.)

4 MBMH and CMC contracted with an AMS subsidiary, AMS California, Inc. (“AMSC”),
 5 for property management. The PMAs provided that AMSC would serve as property manager
 6 and would provide insurance for the MBMH and CMC projects. (*Id.*, p. 8.)

7 B. The Underlying Litigation

8 1. The Fort Benning Action

9 On May 28, 2010, FBFC and FBRC filed their Amended Complaint in the Fort Benning
 10 action, naming AMSE and AMS as defendants. (Ex. 12.) The Amended Complaint sought
 11 declaratory judgments that the subject PMAs were “terminated for cause,” alleging bribery,
 12 “kickbacks” and theft of scrap metal by AMS and AMSE at Fort Benning. (*Id.*, pp. 2–3.)
 13 Termination of the PMAs was mandatory in the event of fraud, theft and intentional misconduct.
 14 *See American Management*, 774 S.E.2d at 244–45.

15 On August 1, 2012, FBFC and FBRC filed their Fifth Amended Complaint in the Fort
 16 Benning action. In addition to allegations of bribery, kickbacks, and theft (Ex. 16, pp. 78–79),
 17 the plaintiffs added allegations of racketeering and Georgia Civil RICO violations and alleged
 18 that AMS falsified work-order data to inflate its annual incentive fee. (*Id.*, pp. 66, 75–83.) The
 19 plaintiffs further alleged an insurance scheme by which AMSE used the “high quality and low
 20 risk” of the military housing to subsidize the insurance costs of riskier multi-family assets
 21 personally owned by AMS/Pinnacle officers, thereby charging the plaintiffs inflated and
 22 undisclosed fees in the master insurance plan. (*Id.*, p. 66.)

23 On March 20, 2014, the Georgia Superior Court ruled on the parties’ cross motions for
 24 summary judgment, denying AMS’s motion and granting in part FBFC and FBRC’s motion.
 25 The court found that AMS had committed intentional misconduct as a matter of law in falsifying
 26

1 work-order data to inflate incentive bonus payments. (D. Greer decl., Ex. 1, p. 6.) The Georgia
 2 Court of Appeals affirmed this finding in *American Management*, 774 S.E. 2d at 241.

3 **2. The MBMH Action**

4 On June 5, 2011, MBMH, CMC, Clark Pinnacle Monterey Bay LLC (“CPMB”), Clark
 5 Monterey Presidio LLC, Clark Pinnacle California Military Communities, LLC, (“CPCMC”),
 6 and Clark Monterey Irwin, LLC sued Pinnacle Monterey LLC, Pinnacle Irwin LLC, AMSC, and
 7 AMS. (Ex. 17.) The MBMH action sought declaratory and injunctive relief regarding the
 8 automatic termination of the agreement based on AMS’s allegedly fraudulent conduct at Fort
 9 Benning and Fort Belvoir. (*Id.*, p. 2.)

10 A Third Amended Complaint was filed in the MBMH action on October 11, 2012,
 11 naming AMSC, AMS, and the Goodman entities, among others, as defendants. (Ex. 20.) The
 12 plaintiffs alleged that after filing their original complaint, the plaintiffs discovered that AMS
 13 employees “have engaged in widespread fraud and intentional misconduct relating to work order
 14 data, and the cover-up of such conduct, at the Monterey project.” (*Id.*, p. 2.) This conduct “is
 15 part of a larger pattern and practice of fraud and intentional misconduct” by AMS. (*Id.*)

16 The Third Amended Complaint sought restitution, disgorgement, damages, and
 17 declaratory and injunctive relief. (*Id.*) The plaintiffs alleged that “defendants and their
 18 employees and agents have committed systematic fraud and intentional misconduct to enrich
 19 defendants at the expense of plaintiffs, and have violated California law by engaging in unlawful,
 20 unfair and fraudulent business practices.” (*Id.*)

21 On August 18, 2014, the plaintiffs filed their Fourth Amended Complaint, adding a cause
 22 of action for violation of 18 USC §1961 *et seq.* (Civil RICO). The plaintiffs alleged a pattern of
 23 racketeering at Fort Benning, Fort Belvoir, Monterey Bay, and Fort Irwin. (Ex. 21.) The case
 24 was removed to the U.S. District Court for the Northern District of California.⁴

25
 26 ⁴ A Fifth Amended Complaint was filed on April 16, 2015, but was never tendered to Scottsdale.

3. The Underlying Settlement

The underlying plaintiffs reached a settlement with AMS in August 2015. (G. Bridgman decl., Ex. 1.) In the agreement, while not admitting liability, AMS affirmed that it was properly removed from the projects, that the underlying plaintiffs brought their claims in good faith, and that there was sufficient evidence for the underlying plaintiffs to prevail. (*Id.*).

C. Tender of the Underlying Litigation to Scottsdale

1. Initial Tender and Denial

AMS tendered the defense of the Amended Complaint in the Fort Benning action to Scottsdale on July 31, 2010. (Exs. 50, 51.) In its Notice of Claim, AMS represented that “[p]laintiff alleges frau[d] and disgorgement of profits due to accounting irregularities.” (Ex. 51.) On August 5, 2010, Scottsdale acknowledged receipt of the lawsuit and advised AMS that the claims were not covered under the Scottsdale policies. (Ex. 53.) On August 17, 2010, Scottsdale denied coverage for the Amended Complaint, explaining that its policies provided coverage only for damages because of “bodily injury” or “property damage” caused by an “occurrence,” as those terms are defined in the policies. (Ex. 29.)

More than two years later, on November 12, 2012, AMS tendered the Fifth Amended Complaint in the Fort Benning action and the Third Amended Complaint in the MBMH action. (Ex. 54.) On January 11, 2013, Scottsdale affirmed its declination of the Fort Benning action and denied coverage for the virtually identical MBMH action. (Ex. 30.) Scottsdale again declined the tender because there was no allegation of “bodily injury” or “property damage” caused by an “occurrence,” and no allegations of “personal or advertising injury.” (*Id.*)

On April 5, 2013, AMS called Scottsdale's attention to paragraphs 97, 120, and 125 in the Fort Benning Fifth Amended Complaint and paragraph 91 in the MBMH Third Amended Complaint, contending that they asserted "potentially covered property damage." (Ex. 31.)

1 Paragraph 97, however, merely alleged a scheme to convert proceeds from the sale of scrap
 2 metal harvested from project homes:

3 97. Beginning in Fall 2007, Pinnacle's top three management
 4 employees at Fort Benning . . . ***engaged in a scheme to harvest***
 5 ***and sell valuable scrap metal*** and potentially other materials of
 6 value from Benning Project homes scheduled for demolition and to
 7 use the proceeds for their own benefit. Rather than accruing to the
 8 Project, ***this money was kept in a Pinnacle safe at the property***
 9 ***and was not returned to the Benning Project.*** Pinnacle again did
 10 not inform FBFC or the Army of this ***fraudulent practice.***

11 (Ex. 16, p. 32 (emphasis added).)

12 Paragraphs 120 and 125 relate to allegations that AMS/Pinnacle deliberately falsified
 13 work orders, designating incomplete work as complete to boost completion bonuses:

14 120. [A] former Pinnacle employee at Fort Benning . . . stated
 15 that "I made approximately 60 or more calls a week, following up
 16 on work orders that were closed out in Yardi, indicating that work
 17 had been completed. Every week, residents told me that the work
 18 was not complete, and in some cases that it had not even been
 19 started. I would conservatively estimate that on average, 30-40%
 20 or more of the residents I called every week told me that the work
 21 was not complete, even though the work order was closed out in
 22 Yardi, showing that it was complete." Upon information and
 23 belief, the work orders were closed prematurely, even though the
 24 work was not done, ***in order to inflate the pass scores.***

25 (Id., p. 40 (emphasis added).) The plaintiffs went on to allege that these fraudulent tactics had
 26 put the lives and safety of military personnel and their families at risk:

27 125. Pinnacle's falsification of work order data has posed, and
 28 continues to pose, a risk to the life and safety of military residents.
 29 Of the thousands of work orders handled each month at these
 30 Projects, many relate to life safety issues including smoke
 31 detectors, carbon monoxide detectors, mold and other potential
 32 safety issues. Because ***part of the scheme to defraud included***
 33 ***closing out work orders where the work had not been performed,***
 34 Pinnacle has created a situation where the Project Owners are
 35 unable to confirm that critical work orders have been responded to
 36 at all . . . and therefore the Owners are unable to go back and do
 37 work that has not been done. Once a work order has been falsely
 38 reported as completed, neither the Project Owners nor Pinnacle's
 39 maintenance staff has any way to determine whether the
 40 maintenance problem has actually been fixed or continues to pose

1 a danger to residents. The Owners of these Projects are currently
 2 attempting to address these *risks created by Pinnacle's fraud.*

3 (*Id.*, p. 42 (emphasis added).)

4 Likewise, paragraph 91 in the MBMH Third Amended Complaint, alleged that a practice
 5 of intentionally misrepresenting incomplete work orders as complete put military families' lives
 6 and safety at risk. (Ex. 20, p. 24.) The plaintiffs alleged that this "scheme to defraud" left
 7 MBMH unable to discern whether maintenance requests had actually been addressed. (*Id.*)
 8 These life and safety risks were "created by Pinnacle's fraud." (*Id.*)

9 On April 11, 2013, Scottsdale advised AMS that the cited paragraphs failed to show a
 10 covered claim because they alleged only economic loss due to fraud and theft, and not accidental
 11 property damage. (Ex. 32.)

12 2. AMS's Extrinsic Evidence

13 Beginning on September 23, 2014, after filing an Insurance Fair Conduct Act ("IFCA")
 14 complaint with the Washington State Insurance Commissioner (Ex. 33), AMS provided extrinsic
 15 information to Scottsdale. (Exs. 56–58.) This included also the summary-judgment orders, in
 16 the Fort Benning action, which ruled that AMS had committed intentional misconduct as a
 17 matter of law in falsifying work-order data to inflate incentive bonus payments. (D. Greer decl.,
 18 Ex. 1.) AMS also submitted declarations from AMS employees testifying to their participation
 19 in the work-order falsification scheme at Fort Benning and Fort Belvoir. (Exs. 37–48.) These
 20 declarations were filed in the MBMH action on September 21, 2014. (*Id.*)

21 The declarations showed nothing more than the intentional nature of AMS/Pinnacle's
 22 conduct. Deena Guinard, for example, testified that she was instructed to change work order
 23 "fails" to "passes" because pass percentage "was part of Pinnacle's contract regarding its
 24 incentive fee and it would impact bonuses." (Ex. 37.) George Boomer stated that, in addition to
 25 falsifying work-order data "to get pass percentages higher, there were times we were told by
 26 Eddie to close out open work orders when the work had not even been done"; however, they

1 “would keep [a] separate list on a sheet of paper so that we could track when the work was really
 2 done.” (Ex. 41.) Krystal Centers reported that AMS/Pinnacle’s maintenance director told her to
 3 close out work orders for flooded basements. When she asked him to confirm this in writing by
 4 email, he did not respond. Later, he told another employee that he had “fudged” some numbers
 5 to be shown Clark and wanted to make sure they would “look correct.” (Ex. 42.) Alanso Arias
 6 was instructed to “bring the work orders to the office and write on them that they were
 7 completed – even though the work was not done . . . so that they could close out the work orders
 8 in the system, so that Pinnacle wouldn’t look bad.” (Ex. 47.)

9 The other witnesses confirmed the intentional and pervasive nature of this scheme.
 10 Jacqueline Mackey, for example, testified that work orders were “closed out” when work was not
 11 completed and that this was a pattern reported by her coworkers over the years. (Ex. 38.) Dane
 12 Smith was taught by managers how to close out work orders and change the response times to
 13 make work orders pass. (Ex. 43.) Patricia Zyzyk was told to change work-order data to make
 14 work orders pass and get pass rate in the “high 90%, ideally at 98%.” (Ex. 44.) Wanda Gotay
 15 spent 60–70% of her time “falsifying the response dates and times, and closing out open work
 16 orders where the work had not been done.” (Ex. 45.) Joshua Merrill was told to have a pass
 17 percentage “close to 95% or higher.” (Ex. 46.) And Harold Hernandez was given “a box with
 18 hundreds of open work orders and told to close them within the correct time parameters, even
 19 though [he] had no information regarding whether the work had been done.” (Ex. 48.)

20 AMS added to this extrinsic evidence on April 15, 2015, when it submitted a Declaration
 21 from U.S. Army Undersecretary Paul David Cramer. Mr. Cramer’s declaration was dated
 22 September 19, 2014 and was filed in the MBMH action on March 24, 2015. (Ex. 49.) He
 23 represented that life safety issues have impacted military families at installations where
 24 AMS/Pinnacle was the property manager. He also clarified, however, that he was “*not*
 25 suggesting that these incidents were the direct result of conduct by Pinnacle.” (*Id.*, ¶ 7)

1 (emphasis added).) Rather, they illustrated the importance of trustworthy responses to work
 2 orders. This supported the Army's assertion "that prompt removal of AMSC is in the best
 3 interest of the Army and of its soldier-residents at Monterey and Irwin." (*Id.*, ¶ 8.) Nowhere did
 4 Cramer state that the MBMH action sought damages for bodily injury or property damage.

5 Scottsdale again denied coverage. (Exs. 35, 36.)

6 **C. The Scottsdale Policies**

7 Scottsdale issued four policies to AMS for the policy periods from April 10, 2008
 8 through April 10, 2012. (Exs. 6, 8–10.)⁵ The 2008–09 and 2009–10 policies described the
 9 named insureds under the policies as follows:

10 [AMS] and all affiliated, subsidiary, associated or allied
 11 companies, corporations, firms, entities, partnerships,
 12 organizations or joint ventures as now exist or may hereafter be
 13 constituted or acquired, or for which the named insured has the
 responsibility for placing insurance and for which similar coverage
 is not otherwise more specifically provided, including but not
 limited to . . . [AMSE]; . . . [AMSC].

14 (Ex. 6, pp. 82–83; Ex. 8, p. 6.) Beginning with the 2010–11 policy, this term was changed to
 15 read:

16 [AMS] and any parent, subsidiary, division, affiliate, associates or
 17 allied companies, corporations, firms, LLCs, partnerships, or joint
 18 ventures that have existed now or may hereafter exist that are
 19 owned, financially controlled or managed and/or in which an
 insured has either insurable interest or an obligation to insured
 [sic], to the extent of that interest or obligation including but not
 limited to . . . [AMSE]; . . . [AMSC].

20 (Ex. 9, p. 7; Ex. 10, p. 7.)

21 The Scottsdale policies covered "those sums that the insured becomes legally obligated to
 22 pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."

23
 24
 25 ⁵ Scottsdale also issued an Excess Liability Policy to AMS for the 2008–09 policy period. (Ex. 7.) This
 26 policy's coverage was subject to the same exclusions in the underlying insurance. (*Id.*, p. 8.) However,
 there was no duty to defend under the excess policy. (*Id.*)

1 (Ex. 6, p. 21; Ex. 8, p. 22; Ex. 9, p. 21; Ex. 10, p. 24.)⁶ Scottsdale had “the right and duty to
 2 defend the insured against any ‘suit’ seeking those damages.” (*Id.*) But it expressly had “no
 3 duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property
 4 damage’ to which this insurance does not apply.” (*Id.*)

5 “Bodily injury” is defined as “bodily injury, disability, sickness, or disease sustained by a
 6 person, including death resulting from any of these at any time.” (Ex. 6, p. 33; Ex. 8, p. 34; Ex.
 7 9, p. 33; Ex. 10, p. 36.) “Property damage” is: (a) “Physical injury to tangible property,
 8 including all resulting loss of use of that property”; or (b) “Loss of use of tangible property that
 9 is not physically injured.” (Ex. 6, p. 35; Ex. 8, p. 36; Ex. 9, p. 35; Ex. 10, p. 38.)

10 This insurance applies only if “[t]he ‘bodily injury’ or ‘property damage’ is caused by an
 11 ‘occurrence’” (Ex. 6, p. 21; Ex. 8, p. 22; Ex. 9, p. 21; Ex. 10, p. 24.) An “occurrence” is “an
 12 accident, including continuous or repeated exposure to substantially the same general harmful
 13 conditions.” (Ex. 6, p. 34; Ex. 8, p. 35; Ex. 9, p. 34; Ex. 10, p. 37.)

14 Additionally, the policies expressly exclude “Expected Or Intended Injury”:

15 “Bodily injury” or “property damage” expected or intended from
 16 the standpoint of the insured. This exclusion does not apply to
 17 “bodily injury” resulting from the use of reasonable force to
 18 protect persons or property.

19 (Ex. 6, p. 22; Ex. 8, p. 23; Ex. 9, p. 22; Ex. 10, p. 25.)

20 The policies also expressly exclude from coverage any damage to property owned, rented
 21 or occupied by, or under the care, custody or control of, the insured:

22 “Property damage” to:

23 (1) Property you own, rent or occupy, including any costs or expenses
 24 incurred by you, or any other person, organization or entity, for
 25 repair, replacement, enhancement, restoration or maintenance of

26 ⁶ The policies also contain a Coverage B, for “personal and advertising injury,” which applies only to
 27 injuries caused by one of seven enumerated offenses. (Ex. 6, pp. 26, 34; Ex. 8, pp. 27, 35; Ex. 9, pp. 26,
 28 34; Ex. 10, pp. 29, 37.) Coverage B is not at issue here. (G. Bridgman decl., Ex. 2.)

1 such property for any reason, including prevention of injury to a
 2 person or damage to another's property.

3 (4) Personal property in the care, custody or control of the insured.

4 (Ex. 6, p. 24; Ex. 8, p. 25; Ex. 9, p. 24, Ex. 13, p. 27.) The policy defines the term "you" to mean
 5 the named insured in the declarations and "any other person or organization qualifying as a
 6 named insured under this policy." (Ex. 6, p. 21; Ex. 8, p. 22; Ex. 9, p. 21; Ex. 10, p. 24.)

7 **III. EVIDENCE RELIED UPON**

8 Scottsdale bases this motion on the pleadings and other documents on file with the Court,
 9 in particular Dkt. Nos. 50-52 in Case No. 2:15-cv-01004-TSZ, the concurrently filed declarations
 10 of Geoff Bridgman and Douglas Greer with attached exhibits, and the law as set forth below.

11 **IV. AUTHORITY AND ARGUMENT**

12 A party is entitled to summary judgment when "there is no genuine dispute as to any
 13 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
 14 The moving party has the burden to show initially the absence of a genuine issue concerning any
 15 material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142
 16 (1970). The burden then shifts to the non-moving party to establish the existence of an issue of
 17 fact regarding an element essential to that party's case, and on which that party will bear the
 18 burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91
 19 L.Ed.2d 265 (1986).

20 Because federal jurisdiction is based on diversity of citizenship, Washington substantive
 21 law applies. *Conrad v. Ace Property & Cas. Ins. Co.*, 532 F.3d 1000, 1004 (9th Cir. 2008). The
 22 "interpretation of language in an insurance policy is a matter of law" for the Court to decide.
 23 *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997); *see also Woo v.*
 24 *Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007) ("Interpretation of an
 25 insurance contract is a question of law"). When, as here, the material facts are not disputed,

1 summary judgment is appropriate. *See McDonald v. State Farm Fire & Casualty Co.*, 119
 2 Wn.2d 724, 730-31, 837 P.2d 1000 (1992).

3 **A. Scottsdale had no duty to defend AMS because the underlying actions
 did not assert a covered claim.**

4 In Washington, the duty to defend is determined under the “eight corners” rule. *Expedia,
 Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59 (2014). The Court compares the four
 5 corners of the insurance contract to the allegations in the four corners of the complaint. *Id.* The
 6 duty to defend is triggered only when the complaint, “construed liberally, alleges facts which
 7 could, if proven, impose liability upon the insured within the policy’s coverage.” *Am. Best Food,
 Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404-05, 229 P.3d 693 (2010) (quoting *Truck Ins.
 Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002)). If “it is clear that the
 8 claim is not covered,” there is no duty to defend. *Id.* at 405. If coverage is ambiguous, however,
 9 a duty to defend may arise from extrinsic evidence. *Truck*, 147 Wn.2d at 761.

10 Here, the lack of coverage is unambiguously shown within the eight corners of the
 11 policies and the underlying complaints. The complaints sought damages only for economic
 12 injury, while the policies covered only claims for bodily injury or property damage. Moreover,
 13 AMS’s extrinsic evidence only confirmed that the underlying actions alleged intentional,
 14 fraudulent conduct by AMS, which is expressly excluded from coverage.

15 **1. Under the “eight corners” of the complaints and the policies, there
 was no covered claim for bodily injury or property damage.**

16 The underlying complaint allegations are anything but ambiguous. The complaints allege
 17 pervasive fraud and racketeering by AMS in managing the subject housing projects. (Ex. 16, pp.
 18 3–5; Ex. 21, p. 3.) The complaints seek equitable and injunctive relief and damages for financial
 19 losses resulting from AMS’s intentional misconduct and fraud. (Ex. 16, pp. 86–87; Ex. 21, pp.
 20 56–57.) The Scottsdale policies, in contrast, agree to cover only those sums that the insured
 21 becomes legally obligated to pay as damages because of “‘bodily injury’ or ‘property damage,’”
 22

1 and to defend only against claims “seeking those damages.” (Ex. 6, p. 21; Ex. 8, p. 22; Ex. 9, p.
 2 21; Ex. 10, p. 24.) Fraudulent business practices fail to trigger any such coverage.

3 a. *Losses caused by AMS's fraud and intentional acts are not bodily
 injury or property damage.*

4 The underlying complaints assert no covered claims. Indeed, the plaintiffs are business
 5 entities, incapable of incurring bodily injury. As for property damage, the controlling definition
 6 of “property damage” is the one provided by the insurance policy. *Overton v. Consol. Ins. Co.*,
 7 145 Wn.2d 417, 429, 38 P.3d 322 (2002). “Courts interpreting insurance policies should be
 8 bound by definitions provided therein.” *Id.* at 427.

9 The Scottsdale policies define “property damage,” in part, as “Physical injury to tangible
 10 property, including all resulting loss of use of that property.”⁷ (Ex. 6, p. 24; Ex. 8, p. 25; Ex. 9,
 11 p. 24, Ex. 13, p. 27.) The underlying plaintiffs asserted no claims for physical injury to tangible
 12 property. Rather, the underlying actions alleged bribery, kickbacks, theft, falsification of work
 13 orders to obtain higher annual incentive fees, and other fraudulent acts. (Ex. 16, pp. 66, 75–83;
 14 Ex. 21, pp. 24–25, 50–53.)

15 Thus, the complaints alleged damages caused by fraudulent and intentional conduct and
 16 not bodily injury or property damage. Business losses are not covered under a commercial
 17 liability policy. *Walla Walla Coll. v. Ohio Cas. Ins. Co.*, 149 Wn. App. 726, 735, (2009)
 18 (diminution in the value of a fuel storage tank is not property damage under policies defining
 19 “property damage” as “physical injury to tangible property, including all resulting loss of use of
 20 that property”); *Scottsdale Ins. Co. v. International Protective Agency, Inc.*, 105 Wn. App. 244,
 21 249–50 (2001) (restaurant’s loss of its liquor license and damage to its business allegedly as a
 22 result of the security contractor’s failure to prevent a minor from gaining admission was not
 23

24 7 Part b. of the definition provides coverage for “[l]oss of use of tangible property that is not
 25 physically injured,” but also requires that the loss of use be caused by an “occurrence,” as
 26 discussed below.

1 “property damage”); *Guelich v. Am. Prot. Ins. Co.*, 54 Wn. App. 117, 121, (1989) (the
 2 obstruction of the view from a property, resulting in diminution of value, is not “physical injury
 3 to tangible property”); *Country Mutual Insurance Company v. Deatly*, No. 13-CV-3029-TOR,
 4 2013 WL 6119231, at *5 (E.D. Wash. Nov. 21, 2013) (“[F]inancial losses caused by the sale of
 5 fraudulent or misrepresented investments are beyond the scope of standard property damage
 6 coverage”), *appeal filed* (9th Cir. Dec. 20, 2013). Indeed, it would contravene Washington
 7 public policy to allow an insured to benefit from such wrongful acts. *See Unigard Mut. Ins. Co.*
 8 *v. Spokane Sch. Dist. No. 81*, 20 Wn. App. 261, 265 (1978).

9 Washington’s prohibition on “property damage” insurance coverage for financial losses
 10 caused by fraudulent activity comports with the law throughout the nation. *See Tschimperle v.*
 11 *Aetna Cas. & Sur. Co.*, 529 N.W.2d 421, 425 (Minn.1995) (financial losses stemming from
 12 fraudulent sale of tax shelter investment do not constitute “loss of use of tangible property”);
 13 *Giddings v. Indus. Indem. Co.*, 112 Cal.App.3d 213, 219 (1980) (“strictly economic losses like
 14 lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an
 15 investment, do not constitute damage or injury to tangible property covered by a [CGL] policy”);
 16 *Allstate Ins. Co. v. Interbank Fin. Servs.*, 215 Cal.App.3d 825, 830–31 (1989) (insurer not
 17 required to defend against lawsuits alleging that insured sold fraudulent tax shelter investments);
 18 *Keating v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 995 F.2d 154, 156 (9th Cir.1993) (“losses
 19 caused by allegedly fraudulent sale of investment bonds not covered under CGL policy”). Thus,
 20 the plaintiffs in the underlying actions did not allege bodily injury as property damage, and they
 21 did not seek any damages that are potentially within the coverage of Scottsdale’s policies.

22 b. *Allegations that AMS stole scrap metal and falsified work orders*
 23 *are not claims for “property damage” or “bodily injury.”*

24 As noted above, AMS claims that certain paragraphs in the complaints in the underlying
 25 actions show a “possibility of property damage or bodily injury.” (Exs. 31, 33.) These
 26 paragraphs present two allegations. The first is that AMS intentionally converted scrap metal,

1 belonging to the Fort Benning plaintiffs, for its own financial gain. The second is that AMS
 2 fraudulently falsified work orders to inflate its completion statistics.

3 With respect to the conversion of scrap metal, this is an allegation of theft, nothing more.
 4 See Ex. 16, ¶ 97 (“Rather than accruing to the Project, this money was kept in a Pinnacle safe . . .
 5 . [AMS] did not inform FBFC or the Army of this fraudulent practice.”) This allegation fails to
 6 trigger the policies’ definition of “property damage.” Indeed, such an interpretation would
 7 contravene Washington’s public policy against liability insurance for intentional harm. See *Am.*
 8 *Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 871, 881 P.2d 1001 (1994).

9 As for the falsification of work orders, these paragraphs allege a scheme to defraud. See,
 10 e.g., Ex. 20, ¶ 91 (“the scheme to defraud included closing out work orders where the work had
 11 not been performed”), ¶ 96 (“Somerville and Schuster directed that records be falsified in order
 12 to boost Pinnacle’s incentive compensation and their bonuses.”); Ex. 16, ¶ 120 (“Upon
 13 information and belief, the work orders were closed prematurely, even though the work was not
 14 done, in order to inflate the pass scores.”)

15 To be sure, the underlying complaints alleged that this scheme put the lives and safety of
 16 military families *at risk*. Yet, the risk of harm does not trigger coverage under a liability policy.
 17 *Wellbrook v. Assurance Co.*, 90 Wn. App. 234, 243 (1998). Here, nowhere did the complaints
 18 claim that the practice caused any injury or damage or that the plaintiffs were entitled to damages
 19 for bodily injury or property damage caused by the falsification of work orders. Nor did the
 20 underlying complaints allege that the plaintiffs even had standing to assert claims for damages
 21 incurred by military families.

22 In short, these allegations show that the underlying actions are commercial disputes
 23 alleging fraud and intentional misconduct by AMS. They fail to show that the underlying
 24 complaints sought damages for bodily injury or property damage. As such, the underlying
 25 actions were not covered claims, and Scottsdale had no duty to defend AMS.

26

1 **2. Scottsdale had no duty to defend because the underlying actions did**
 2 **not allege a covered “occurrence.”**

3 AMS’s claim for a defense fails for the additional reason that the underlying actions did
 4 not allege an “occurrence.” As set forth above, before coverage can attach AMS must prove not
 5 only that the underlying complaints alleged “bodily injury” or “property damage,” but also that
 6 such injury or damage was caused by an “occurrence” as that term is defined in the policies.
 7 (Ex. 6, p. 21; Ex. 8, p. 22; Ex. 9, p. 21; Ex. 10, p. 24.) The policies define “occurrence” as an
 8 “accident.” (Ex. 6, p. 34; Ex. 8, p. 35; Ex. 9, p. 34; Ex. 10, p. 37.)

9 Where an insurance policy defines an occurrence as an “accident,” it denotes “an
 10 unusual, unexpected, and unforeseen happening.” *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91,
 11 95, 776 P.2d 123 (1989). *See also, Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 756, 320
 12 P.3d 77 (2013) (holding no duty to defend where insured acted intentionally). Washington law is
 13 settled that “an accident is never present when *a deliberate act* is performed unless some
 14 additional unexpected, independent and unforeseen happening occurs which produces or brings
 15 about the result of injury or death. *The means as well as the result must be unforeseen,*
 16 *involuntary, unexpected and unusual.*” *Brousseau*, 113 Wn.2d at 96 (emphasis added) (citing
 17 *Unigard*, 20 Wn. App. at 265); *accord. Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 16, 977 P.2d
 18 617 (1999). *See also State Farm Fire & Cas. Co. v. Parrella*, 134 Wash. App. 536, 540-41, 141
 19 P.3d 643 (2006); *Lloyd v. First Farwest Life Ins. Co.*, 54 Wn. App. 299, 302–04 (1989); *Safeco*
 20 *Ins. Co. of Am. v. Dotts*, 38 Wn. App. 382, 385–86 (1984).

21 In *Unigard*, for example, a boy broke into a building and set a fire. The court held that,
 22 even though the boy did not intend or expect to cause damage to the building, the damage was
 23 not caused by an accident. *Unigard*, 20 Wn. App. at 263–64. In *Lloyd*, the insured suffered a
 24 cerebral aneurysm from deliberately inhaling cocaine. The court held that treating this
 25 unintended result as a covered “accident” would “‘obliterate’ the distinction at common law
 26 between ‘accidental results’ and ‘accidental means.’” *Lloyd*, 54 Wn. App. at 301 (quoting

1 *Whiteside v. New York Life Ins. Co.*, 7 Wn. App. 792, 503 P.2d 1107 (1972)). In *Dotts*, the
 2 insured slapped the victim's face, intending to gain the victim's attention. Holding that the
 3 victim's unintended death from the slap was not an "accident" for insurance purposes, the court
 4 explained "that an accident is 'never present' when a deliberate act is performed absent an
 5 'independent' unforeseen act." *Dotts*, 38 Wn. App. at 387 (quoting *Johnson v. Business Men's*
 6 *Assur. Co. of Am.*, 38 Wn.2d 245, 249, 228 P.2d 760 (1951)). In *Parrella*, a teenager fired a BB
 7 gun at his friend as a prank, unintentionally hitting him. There was no insurance coverage for
 8 the unintended injury because a "prudent person . . . would know that shooting a loaded BB gun
 9 could cause injury." *Parrella*, 134 Wn. App. at 541. The insured's subjective intent was
 10 irrelevant. *Id.* (citing *Grange Ins. Ass'n v. Authier*, 45 Wn. App. 383, 386, 725 P.2d 642 (1986)).

11 Washington courts routinely decline to find a duty to defend where the complaint against
 12 the insured alleges intentional or fraudulent conduct. *See, Grange Ins. Ass'n v. Roberts*, 179
 13 Wn. App. 739 (2013); *USAA v. Speed*, 179 Wn. App. 184 (2014) (no coverage for alleged road
 14 rage); *State Farm & Casualty Co. v. Heather Ridge L.P.*, 2013 U.S. Dist. Lexis 6747 (W. Dist.
 15 WA 2013) (no duty to defend where complaint alleged insured fraudulently concealed defects to
 16 apartments).

17 Likewise, here, the underlying actions alleged no accidents. They alleged an intentional
 18 scheme to defraud the plaintiffs. AMS's deliberate fraudulent business practices are not covered
 19 "occurrences" under the Scottsdale policies.

20 **3. AMS's extrinsic evidence failed to show coverage.**

21 As explained above, after Scottsdale denied coverage, AMS submitted extrinsic
 22 information in an effort to show the possibility of property damage in the underlying actions.
 23 None of this information, however, changed the foregoing conclusions. Rather, it did just the
 24 opposite: it confirmed that the underlying actions involved economic damages caused by
 25 intentional, fraudulent conduct and thus failed to trigger any duty to defend.
 26

1 “[A]ssuming no ambiguities in the pleadings, the insurer need not look beyond the face
 2 of the pleadings.” *R.A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wn. App. 290, 295–96, 612 P.2d
 3 456 (1980). Facts outside the complaint may be considered only if ““(a) the allegations are in
 4 conflict with facts known to or readily ascertainable by the insurer or (b) the allegations of the
 5 complaint are ambiguous or inadequate.”” *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 73 Wn. App. 858,
 6 862, 872 P.2d 536 (1994) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106
 7 Wn.2d 901, 908, 726 P.2d 439 (1986)). Here, again, there was no ambiguity in the pleadings,
 8 which clearly raised claims that were not covered under the Scottsdale policies.

9 Nonetheless, Scottsdale considered AMS’s extrinsic information and correctly concluded
 10 that it did nothing to support AMS’s claim. AMS pointed to the declarations of its former
 11 employees who testified about their participation in the fraudulent scheme to falsify work-order
 12 data. (Exs. 37–48.) Although AMS contended that this scheme could have potentially resulted
 13 in property damage, none of these witnesses represented that any such damage actually occurred.

14 In an effort to fill this gap, AMS submitted the declaration of Undersecretary Cramer.
 15 (Ex. 49.) Although Mr. Cramer mentioned that military families had been affected by life safety
 16 issues at locations managed by AMS/Pinnacle, he was also quick to clarify that he was “***not***
 17 ***suggesting that these incidents were the direct result of conduct by Pinnacle.***” (*Id.*, ¶ 7
 18 (emphasis added).) He made this assertion ***not*** to support a claim for damages against AMS, but
 19 to justify the “prompt removal” of AMS as a property manager. (*Id.*, ¶ 8.)

20 Extrinsic evidence, of course, cannot serve as a basis to deny coverage. *See Expedia*, 180
 21 Wn.2d at 803. The point, however, is that AMS’s proffered evidence utterly failed to show a
 22 covered claim. Instead, it simply confirmed the unavoidable interpretation that the eight corners
 23 of the policies and the complaints did not establish coverage.

24

25

26

1 **B. Any coverage would be barred by express policy exclusions.**

2 Because the underlying actions do not assert any covered claims, it is not necessary to
 3 analyze coverage exclusions. However, AMS's claims against Scottsdale fail for the additional
 4 and independent reason that any hypothetical property damage or bodily injury alleged to have
 5 been caused by an accidental occurrence would have been subject to policy exclusions. In
 6 particular, the policies exclude: (1) expected or intended injury; and (2) damage to property
 7 owned or rented by a named insured. All of the types of harm, which AMS claims may have
 8 possibly occurred in the underlying actions, would be subject to one or both of these exclusions.

9 **1. All injuries alleged in the underlying actions were expected or
 10 intentional.**

11 In addition to requiring an "occurrence," which must be accidental, the policies also
 12 expressly exclude injury or damage that is "expected or intended from the standpoint of the
 13 insured." (Ex. 6, p. 22; Ex. 8, p. 23; Ex. 9, p. 22; Ex. 10, p. 25.) In deciding whether an insured
 14 subjectively expected or intended the damage, the Court may "rely on facts from which an
 15 inference about the insured's state of mind must be drawn, such as the obviousness of already
 16 occurring harm." *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wash. 2d 50, 69,
 17 882 P.2d 703, 714 (1994) (quoting K. Abraham, *Environmental Liability Insurance Law* 134
 18 (1991)). Intent to injure is imputed to the insured as a matter of law when the insured engages in
 19 obviously harmful conduct. *See Rodriguez v. Williams*, 107 Wn.2d 381, 387, 729 P.2d 627
 20 (1986) (imputing injurious intent to insured in claim based on statutory rape).

21 Here, the theoretical property damage that AMS contends possibly could have been
 22 raised in the underlying actions would all have been expected or intended as a matter of law. It
 23 cannot rationally be asserted that a party who steals someone's scrap metal does not intend or
 24 expect that the person from whom it is stolen will be deprived of its use. Likewise, a property
 25 manager that fails to repair a smoke or carbon monoxide detector, while representing that it has
 26

1 been repaired, cannot reasonably claim that it was somehow unexpected that residents would
 2 thereby be placed at risk of injury from smoke or carbon monoxide damage.

3 **2. The policies exclude damage to property owned, rented, or possessed
 4 by the underlying plaintiffs.**

5 Finally, the Scottsdale policies contain exclusion “j,” which essentially prohibits
 6 coverage for damage to property under the insured’s control. Two subsections are relevant here:
 7 subsection j(1) excludes damage to “[p]roperty you own, rent, or occupy”; and subsection j(4)
 8 excludes damage to “[p]ersonal property in the care, custody or control of the insured.” (Ex. 6,
 9 p. 24; Ex. 8, p. 25; Ex. 9, p. 24, Ex. 13, p. 27.) The purpose of such exclusions is “to prevent a
 10 general liability policy from providing first-party benefits to the insured.” *State Farm Fire &*
 11 *Cas. Co. v. English Cove Ass’n, Inc.*, 121 Wn. App. 358, 360–61, 88 P.3d 986 (2004); *see also*
 12 *Cle Elum Bowl, Inc. v. N. Pac. Ins. Co.*, 96 Wn. App. 698, 704, 981 P.2d 872 (1999) (enforcing
 13 exclusion for damage to property “you own, rent, or occupy”).

14 In analyzing exclusion j(1), the Court must first determine who owned or rented the
 15 subject properties. The MBMH action alleged that MBMH and CMC either owned or rented the
 16 subject properties. According to the PMAs, which were attached to the original complaint and
 17 incorporated by reference in the Fourth Amended Complaint, MBMH and CMC were the
 18 owners. (Ex. 17 at *Ex. II* p. 1, *Ex. IV* p. 1; Ex. 21, p. 7.) The underlying plaintiffs alleged,
 19 however, that MBMH and CMC “actually hold the real property pursuant to fifty-year leases.”
 20 (Ex. 21, p. 7.) Similarly, the PMAs attached to and incorporated by reference in the Fort
 21 Benning complaints (Ex. 12, p. 14) identified FBFC and FBRC as owners of the Fort Benning
 22 and Fort Belvoir properties. (Ex. 12 at *Ex. 1* p. 1, *Ex. 2* p. 1.)

23 Because MBMH, CMC, FBFC, and FBRC either owned or rented the subject property,
 24 and exclusion j(1) applies to property “you own, rent, or occupy,” the next question is whether
 25 these entities qualify as “you.” The policies define the “you” as the named insured in the

1 declarations and “any other person or organization qualifying as a Named Insured under this
 2 policy.” (Ex. 6, p. 21; Ex. 8, p. 22; Ex. 9, p. 21; Ex. 10, p. 24.)

3 As detailed above, the policies defined the named insureds as AMS and all affiliates,
 4 associated or allied companies, partnerships, joint ventures, etc. (Ex. 6, pp. 82–83; Ex. 8, p. 6
 5 Ex. 9, p. 7; Ex. 10, p. 7.) The named insureds also included any entity for which a named
 6 insured was responsible for obtaining insurance. (*Id.*)

7 MBMH, CMC, FBFC, and FBRC are named insureds, and therefore “you” under the
 8 policies, for two reasons. First, they were unquestionably affiliated, associated, allied,
 9 partnerships, or joint ventures with AMS. The MBMH plaintiffs, for example, alleged that AMS
 10 and AMSC (collectively referred to in the underlying action as “Pinnacle”) formed affiliates to
 11 serve as minority members in Clark Pinnacle LLC, which in turn were “the managing members
 12 of several ‘Owner’ limited liability companies, including Co-Plaintiffs MBMH and CMC.” (Ex.
 13 21, pp. 2, 7 (footnote omitted).) The Fort Benning action alleged that AMS had similar
 14 relationships to FBFC and FBRC. (Ex. 12, p. 2.) These allegations describe an affiliation, joint
 15 venture, or other similar relationship with AMS, which renders MBMH, CMC, FBRC, and
 16 FBFC named insureds.

17 Second, these entities also qualified as named insureds because they were entities for
 18 which the named insured had the responsibility for placing insurance. (Ex. 6, pp. 82–83; Ex. 8,
 19 p. 6 Ex. 9, p. 7; Ex. 10, p. 7.) The PMAs—attached to and incorporated by reference in the
 20 complaints—identified MBMH, CMC, FBRC, and FBFC as the “Owners.” The MBMH and
 21 CMC PMAs identified AMSC as the property manager and provided that it “shall obtain and
 22 keep in force” insurance coverage “for the benefit of Owners and Manager and such additional
 23 insured as may be necessary from time to time.” (Ex. 17 at *Ex. II* pp. 1, 9, *Ex. IV* pp. 1, 8.) The
 24 Fort Benning and Fort Belvoir PMAs are identical, requiring AMSE, as the property manager, to
 25 obtain insurance for FBRC and FBFC as the owners. (Ex. 12 at *Ex. I* pp. 1, 8, *Ex. 2* pp. 1, 9).

1 Both AMSE and AMSC are named insureds. (Ex. 6, p. 83; Ex. 8, p. 6; Ex. 9, p. 7; Ex. 10, p. 7.)
2 Thus, FBFC, FBRC, MBMH and CMC are named insureds under the policies, as entities for
3 which the named insured has the responsibility for placing insurance.

4 As for exclusion j(4), Washington courts have held that exclusions for property damaged
5 while in the insured's "care, custody or control" are enforceable and unambiguous. See *Madden*
6 v. *Vitamilk Dairy, Inc.*, 59 Wn.2d 237, 239, 367 P.2d 127 (1961); *Wada v. Nationwide Mut. Ins.*
7 Co., 42 Wn. App. 433, 435-36, 711 P.2d 384 (1985); *New Hampshire Ins. Co. v. Abellera*, 6 Wn.
8 App. 650, 652, 495 P.2d 668 (1972). This exclusion would bar coverage if the underlying
9 plaintiffs had asserted a hypothetical claim for AMS's conversion of scrap metal at the Fort
10 Benning project. Necessarily, to have harvested and sold scrap metal for its own benefit, AMS
11 would have had custody or control over it. As such, Scottsdale had no duty to defend any of the
12 claims that, according to AMS, the underlying plaintiffs could have theoretically raised.

V. CONCLUSION

14 For the reasons set forth above, Scottsdale respectfully requests that the Court grant
15 summary judgment in its favor.

DATED this 6th day of November, 2015.

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SCOTTSDALE INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT - 25
Case No.: C15-cv-01000

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CERTIFICATE OF SERVICE

I certify under the laws of the United States of America that on the 6th day of November, 2015, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF System and served counsel below by the method indicated:

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